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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. [redacted] 84

JESSE TURNER,
Appellant,

vs.

CITY OF MEMPHIS, a Municipal Corporation Chartered under the Laws of the State of Tennessee, and DOBBS HOUSES, INC., a Corporation Organized and Existing under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,
Appellees.

MOTION TO DISMISS APPEAL.

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Appellees, Dobbs Houses, Inc., and W. A. Haverfield, Manager of the Dobbs Houses, Inc., restaurant in Memphis Municipal Airport, file this Motion to Dismiss pursuant to United States Supreme Court Rule 16, on the ground that this case does not present a substantial federal question at this time.

OPINION BELOW.

The opinion of the three-judge District Court, not having been printed on the date of filing this brief, may be found in Appendix "A" of appellant's brief, and in Appendix "A" of motion to dismiss filed on behalf of the City of Memphis.

JURISDICTION.

Appellees submit to the jurisdiction of this Court.

STATUTES INVOLVED.

As stated in the Jurisdictional Statement filed on behalf of Jesse Turner, appellant, at pages 4, 5, and 6, the appellees did rely on certain statutes and regulations of the State of Tennessee and its governmental agency, Department of Conservation, Division of Hotel and Restaurant Inspection wherein there has been promulgated a valid regulation of said Division and Department designated as Regulation No. R-18(1), which reads as follows:

> "Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises."

Violation of the above quoted regulation is declared to be a misdemeanor punishable by fine by Section 53-2120, Tennessee Code Annotated, which reads as follows:

"Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant who shall fail or refuse to comply with any of the provisions of this Act, or with the rules and regulations promulgated by the Division shall be deemed guilty of a misdemeanor, and shall be fined not less than Ten Dollars nor more than One Hundred Dollars for each offense, and each day after sufficient notice has been given shall constitute a separate offense."

QUESTION PRESENTED.

Whether there was an abuse of discretion by the three-judge court in refusing to enjoin appellees from operating under laws of the State of Tennessee, the constitutionality of which has not been properly challenged by the appellant herein in the courts of Tennessee.

STATEMENT OF FACTS.

Appellees admit the facts as stated by the appellant beginning on page 7 of his brief.

PROPOSITIONS OF LAW.

I. Defendant Dobbs Houses, Inc., is precluded by state regulation promulgated pursuant to statute from serving negro and white patrons in a common restaurant facility.

Section 53-2120, Tennessee Code Annotated, Regulation No. R-18(1), Department of Conservation, Division of Hotel & Restaurant Inspection, Third Defense.

II. Defendant Dobbs Houses, Inc., must treat the statute and regulation as constitutional at its peril, until judicially otherwise decreed.

Claybrook v. *State*, 164 Tenn. 440, 443, (1932).
Beaver v. *Hall et al.*, 142 Tenn. 416 (1919).
Hunter v. *State*, 158 Tenn. 63 (1928).

III. Constitutionality of state law being a primary issue, this is a proper case for the application of the principle of abstention so that Tennessee Courts may have a reasonable opportunity to construe the Tennessee Statute and Regulation.

Harrison v. *NAACP*, 360 U.S. 167 (1959).

ARGUMENT.

The case at bar arises to this Supreme Court in opposition to the established principle that the federal courts should avoid passing on questions of the constitutionality of state laws in situations where an authoritative interpretation of state law by state courts may avoid potential constitutional issues. The doctrine of abstention of federal courts was applied by the three-judge court in the action below as follows, in part:

> "In Harrison v. NAACP, 360 U.S. 167, the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: 'This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts." Matthews v. Rodgers,

284 U.S. 521, 525, as their contribution * * * in furthering the harmonious relation between state and federal authority . . .' Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary cons. utional adjudication.

"Thus, in the light of the *Harrison* case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein." Also see Appendix "A", Jurisdictional Statement of the appellant, and *Harrison* v. *NAACP*, 360 U.S. 167 (1959) (at pp. 176-177).

In focusing upon a successful and unique federal system of governmental functioning the members of the three-judge court below[1], combined their long years of judicial experience and wisdom to apply the doctrine of abstention

1. Martin, Circuit Judge, and Boyd and Miller, District Judges.

as defined by Mr. Justice Harlan in *Harrison* v. *NAACP*, *supra*. This conclusion was apparently reached with the knowledge that our federal system has proven to be successful in that it permits the distribution of the governmental work load between the federal government and the respective state governments. And with the knowledge that it is unique because it gives these state governments the necessary degree of flexibility needed in order to live and prosper in harmony with one another.

Under the laws of Tennessee a declaratory judgment statute[2] is available to the appellant through which he may assert his grievance. The natural result of this procedure would permit the State of Tennessee an opportunity to determine the constitutionality of its own laws. This would be a procedure that is in keeping with the dignity that should be afforded any state of our Federal Union, and is, by the same token, consistent with the decisions of the Supreme Court. It is not unreasonable to assume that the State of Tennessee will fulfill its duty in construing these laws in the light of state and federal constitutional requirements. It is submitted that the Supreme Court of Tennessee has no inclination to shirk its duty toward this Supreme Court or its interpretation of the Constitution of the United States. In *Roy* v. *Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956) it was held that under the supremacy clause of Article 6 of the Constitution of the United States, the Tennessee Supreme Court was bound by the holding of the United States Supreme Court in the case of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and that the segregation of races in the field of public education under the separate but equal doctrine deprived persons

2 Tenn. Code Ann., Vol. 5, Sec. 23-1101, *et seq.*

so segregated of the equal protection of the laws guaranteed under this amendment.

Upholding the doctrine of abstention in the case at bar would not be construed to mean that the federal courts lose jurisdiction in cases where the state courts have not passed upon the statute under attack, or that the federal court is powerless to take any action until a decision by the state court has been rendered. *NAACP* v. *Patty*, 159 F. Supp. 503 (E.D. Va. 1958). The position of the federal courts is in no way diminished by this procedure.

Mr Justice Harlan said in the *Harrison* case, *supra*:

> "* * * All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. * * *" (at p. 178).

This statement, by that distinguished jurist, exemplifies appellees' position and demonstrates what the Court is asked to consider, and to allow.

CONCLUSION.

It is, therefore, prayed that this appeal be dismissed, or deferred until such time as the courts of Tennessee have been afforded an opportunity to construe, interpret and pass on the validity of the state laws and regulations hereinbefore set forth.

Respectfully submitted,

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